IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CAPITAL INVESTMENT FUNDING, LLC

Plaintiff,

v.

LANCASTER RESOURCES, INC.; LRI II, LLC; LANCASTER GROUP, LLC; 115 EAST CENTRAL BLVD, LLC; 39 UNION SQUARE, LLC; 41 LEGION, LLC; 410 BRINKERHOFF, LLC; 411 BRINKERHOFF AVE, LLC; 5 CASTLE HILL COURT, LLC; 638 EAST CRESENT, LLC; BERGEN 73, LLC, CLUB DRIVE, LLC; CREEKSIDE PARTNERS, LLC; FOUR-FIFTHS, LLC; HIGH POINT HOLDINGS, LLC; LAKEVIEW AT HIGH POINT, LLC; LAKEVIEW LIQUORS, LLC; LANCASTER DEVELOPERS, LLC; LANCASTER PROPERTY MANAGEMENT,LLC; LANCASTER REALTY GROUP, LLC; MONTAGUE HOLDINGS, LLC; PITSKYLIQ LLC; PRESIDENT ROAD, LLC; RIDGEFIELD PARK OFFICE COMPLEX, LLC; ROBERT J. L'ABBATE REAL ESTATE INVESTMENTS, INC.; SHEADS, LLC; SKYMARK ASSOCIATES, LLC; SKYMARK HOLDINGS, INC.; SKYMARK HOMES II, LLC; SKYMARK HOMES, LLC; SKYMARK PARTNERS, LLC; SKYMARK, LLC; WEST PALISADES COMMONS, LLC; WILTSHIRE PROPERTIES, LLC; ROBERT J. L'ABBATE; MARTIN ENDER; STUART KATZ; JAMES CASERTA; NEW RESOURCES, LLC; NEW DEVELOPERS, LLC; NEW GROUP, LLC; POINT PLEASANT TOWERS, LLC; JOHN DOES 1-10 (NAMES BEING FICTITIOUS) and ABC COMPANIES 1-100 (NAMES BEING FICTITIOUS),

Defendants.

Case No. 2:08-cv-04714 (JLL)(JAD)

CIVIL ACTION

BRIEF ON BEHALF OF PLAINTIFF, CAPITAL INVESTMENT FUNDING, LLC IN SUPPORT OF MOTION TO IMPOSE A CONSTRUCTIVE TRUST

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PREFATORY STATEMENT

Plaintiff, Capital Investment Funding, LLC ("CIF"), submits this Motion seeking an Order imposing a constructive trust on $8.5 Million in funds expected to be received imminently by Defendants, Stuart Katz ("Katz") and Wiltshire Properties, LLC ("Wiltshire").

PROCEDURAL HISTORY

This action was commenced by CIF with the filing of a Complaint on or about September 22, 2008. See Certification of Christopher H. Westrick, Esq. ("Westrick Cert."), Exhibit **A**. CIF filed an Amended Complaint on or about October 10, 2008. See Westrick Cert., Exhibit **B**.

On January 28, 2009, a Chapter 11 Voluntary Petition was filed with the United States Bankruptcy Court for the District of New Jersey on behalf of Robert L'Abbate, an originally-named Defendant in this matter. See Westrick Cert., Exhibit **C**. The Bankruptcy Petition included as debtors nine "affiliates" of Robert L'Abbate. See Westrick Cert., Exhibit **C**. The filing of the Bankruptcy Petition had the effect of imposing a stay upon this matter pursuant to 11 U.S.C. § 362(a). See Westrick Cert., Exhibit **C**.

On June 19, 2009, Judge Linares issued an Opinion and Order on Motions to Dismiss filed by Defendants, James Caserta, Stuart Katz and Martin Ender. See Westrick Cert., Exhibit **D** and Exhibit **E**. Judge Linares granted the Motions to Dismiss in part, without prejudice, and denied them in part. *Id.* On August 12, 2009, Judge Linares entered an Order staying the case in its entirety and directing that CIF would be permitted to file an amended complaint against Defendants Caserta, Katz and Ender upon the conclusion of the Bankruptcy proceeding. See Westrick Cert., Exhibit **F**. On November 10, 2011, Judge Linares entered an Order directing the

Clerk to administratively terminate this action without prejudice, subject to reopening "upon termination of the proceedings before the bankruptcy court or for good cause shown . . . ." See Westrick Cert., Exhibit **G**.

On February 20, 2014, the Bankruptcy proceeding was terminated by Order and Final Decree of the Honorable Rosemary Gambardella, U.S.B.J. See Westrick Cert., Exhibit **H.**

On March 14, 2014, CIF moved to reinstate and file a Second Amended Complaint as contemplated by the Court's Orders of June 17, 2009 and August 12, 2009. On April 23, 2014, the Honorable Jose L. Linares, U.S.D.J. entered an Order to reinstate this matter to the active docket and granted CIF Leave to file a Second Amended Complaint as contemplated by the Court's Orders of June 17, 2009 and August 12, 2009. See Westrick Cert., Exhibit **I.** On May 23, 2014, CIF filed the Second Amended Complaint. See Westrick Cert., Exhibit **J**.

On July 16, 2014, a conference in this matter was conducted before the Honorable Joseph A. Dickson, U.S.M.J. Following that conference, an Order was entered permitting CIF to file a Motion seeking leave to file a Third Amended Complaint. See Westrick Cert., Exhibit **K**. On August 20, 2014, CIF filed its Motion for Leave, which Motion is presently returnable on October 20, 2014. See Westrick Cert., Exhibit **L**, Notice of Motion.

STATEMENT OF FACTS

In this action, CIF seeks recovery of in excess of $18 Million it loaned to various New Jersey entities and individuals associated with a business venture originally known as Lancaster Resources, Inc. ("LRI")[1]. Defendant Katz is one of the key individuals involved in the formation of LRI, its lending relationship with CIF, and the use of funds loaned by CIF directly or indirectly to many of the Defendants. See Westrick Cert., Exhibit J, Second Amended Complaint generally. Katz was one of the initial shareholders of LRI, and a member of the initial Board of Directors of CIF. See Westrick Cert., Exhibit J, Second Amended Complaint, ¶¶ 67-69. By virtue of these roles, he has been intricately involved in the various transactions between CIF and LRI, and investments and transactions involving funds loaned by CIF, which are central to this lawsuit.

Funds loaned by CIF to LRI or LRI affiliates[2] were invested between approximately 2000 and 2007 in various real estate ventures in New Jersey. See Westrick Cert., Exhibit J, Second Amended Complaint generally. Upon information and belief, as a result of the activities of the Defendants including the management of LRI and LRI affiliates, utilization of CIF funds, and transactions implemented between and among the Defendants and third parties, all but one of the real estate assets in which CIF-loaned funds were invested became insolvent. See Westrick Cert., Exhibit J, Second Amended Complaint, ¶¶ 173-174; 186-188; 249-304. Most of these real estate investments were owned by debtors in the Bankruptcy Action. The only known asset owned directly or indirectly by any of the LRI affiliates, in which CIF-loaned funds were used, is a 33-acre parcel of undeveloped property in Ridgefield Park, New Jersey (the "Property").

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[1] LRI was formed in 1999 but in 2007 was merged into a new entity known as "LRI II, LLC". See Westrick Cert., Exhibit J, Second Amended Complaint. All references herein to LRI are intended to include the surviving entity known as LRI II, LLC.

[2] LRI affiliates include all of the entities identified as Defendants in this case.

The Property, upon information and belief, until recently was owned by an entity known as Pitcairn Skymark, LLC. That entity was in turn 50 percent owned by Defendant Ridgefield Park Office Complex, LLC ("RPOC") and 50 percent by an independent investor. Upon information and belief, until recently Defendant Wiltshire owned a 50% interest in Ridgefield Park Office Complex, LLC ("RPOC"). Further, Defendant Katz owns an overwhelming majority interest in Wiltshire. See Westrick Cert., Exhibit **J**, Second Amended Complaint, ¶¶ 260-281.

A recently-conducted title search on the Property revealed the presence of a mortgage on the Property in favor of Katz and Wiltshire in the amount of $8.5 Million. See Westrick Cert., Exhibit **M**, Title Report. The Mortgage references a Settlement Agreement and Mutual Release between a variety of parties including an entity known as Brickhouse Partners, LLC, Wiltshire, Katz, RPOC and others. See Westrick Cert., Exhibit **N**, Mortgage & Security Agreement. In a brief filed with the Court on October 6, 2014 in opposition to CIF's pending Motion for Leave to Amend the Complaint, RPOC has set forth the following facts that are directly relevant to this Motion:

- RPOC and its part owner, Brickhouse Partners, LLC, filed an action in equity against Katz and Wiltshire in 2012 concerning the management of RPOC and the Property.
- This equity action was resolved by way of a Settlement Agreement consummated in or around October 2013.
- The settlement between RPOC/Brickhouse and Katz/Wiltshire called for the total sum of $9 Million to be paid to Katz/Wiltshire in exchange for their interests in the Property.
- Katz/Wiltshire were paid $500,000 up front and they were granted a mortgage on the Property for the remaining $8.5 Million.
- RPOC/Brickhouse intend to pay the remaining $8.5 Million to Katz/Wiltshire "in early Fall" of this year.

See Westrick Cert., Exhibit **O**, RPOC Brief dated October 6, 2014, generally.

Based upon these facts as presented to the Court by RPOC, it appears that at any time the sum of $8.5 Million will be remitted to Katz/Wiltshire. Of course, it is entirely unknown what Katz/Wiltshire will do with those funds upon receipt but CIF is concerned that those funds will no longer be available if and when it obtains a judgment in this matter against Katz and/or Wiltshire.

As discussed in detail in the Second Amended Complaint, LRI through its principals – including Katz – borrowed substantial sums of money from CIF pursuant to a revolving credit arrangement whereby LRI was supposed to collateralize those loans. See Westrick Cert., Exhibit **J**, Second Amended Complaint, *inter alia*, ¶¶ 263-265. Indeed, LRI used CIF funds to invest in many real estate projects but failed almost entirely to take any steps to collateralize the debt owed to CIF. See Westrick Cert., Exhibit **J**, Second Amended Complaint, generally.

With full knowledge that the debt owed to CIF was not properly collateralized, Katz and others directly participated in actions that encumbered the properties that were intended to serve as collateral for CIF. See Westrick Cert., Exhibit **J**, Second Amended Complaint, ¶¶ 249-304. CIF alleges that it is the specific failure to properly collateralize the debt owed to it by LRI and the LRI affiliates that has lead directly to CIF's losses.

The confusing labyrinth of LLCs created in connection with LRI and its investments exacerbates the problem by obscuring the path of inter-company lending and capital contributions. See Westrick Cert., Exhibit **J**, Second Amended Complaint, ¶¶ 316-329. The network of company ownership and cross-investment is so complex that even its own participants – Katz included – have acknowledged the difficulty in sorting it out. *Id.*

Additionally, in its proposed Third Amended Complaint CIF seeks to add a count for collection of a book account related specifically to capital contributions to Wiltshire. See Westrick Cert., Exhibit **P**, Third Amended Complaint, ¶¶ 455-461. Upon information and belief, in approximately 2003 CIF extended loans totaling $2 million directly to Wiltshire for the benefit of Katz and the other members. *Id.* CIF alleges that these loans remain outstanding and by virtue of acquiring the other members' interests in Wiltshire, Katz (if not Wiltshire) is responsible for paying those loans.[3]

CIF, which has undisputedly sustained losses in excess of $18 million, respectfully seeks to have the Court impose a constructive trust upon the substantial funds that Katz and Wiltshire are expected to imminently receive. This relief is requested for the specific purpose of preserving the status quo in order to protect CIF's ability to collect if it is successful in obtaining a judgment against Katz and/or Wiltshire.

LEGAL ARGUMENT

POINT I

A CONSTRUCTIVE TRUST SHOULD BE PLACED ON THE FUNDS DEFENDANTS KATZ AND WILTSHIRE ARE EXPECTED TO RECEIVED IN THE IMMINENT SALE OF THE PROPERTY

A constructive trust is an equitable remedy that, under New Jersey law, can be imposed where property has been transferred by a wrongful act including fraud, mistake or undue influence, or where property has not been wrongfully acquired but retention would result in unjust enrichment. See S.E.C. v. Antar, Civ. No. 93-3988 (D.N.J. 1998). The imposition of

[3] Katz is believed to own at least 92 percent of Wiltshire. See Westrick Cert., Exhibit **Q**, Certification of Stuart Katz from Brickhouse Partners, LLC v. Katz et al., BER-C-315-12, ¶ 5.

constructive trusts is not limited to real property. Rather, if the property has been sold the trust attaches to its proceeds in the hands of the defendant, or to other property purchased by defendant into which the original property or its proceeds can be traced. George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 471, at 4-5 (2d ed.1978).

The New Jersey Uniform Fraudulent Transfer Act ("UFTA"), which is codified at N.J.S.A. §25:2-20[4], expressly recognizes the availability of equitable remedies against debtors who engage in fraudulent transfers. See N.J.S.A. §25:2-29. "The purpose of the fraudulent conveyance statute is to prevent insolvent debtors from placing their property beyond the reach of their creditors while at the same time enjoying the benefits thereof." United States v. Jones, 877 F. Supp. 907, 916 (D.N.J. 1982). Among other remedies, a creditor may obtain "(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim ... (3) (a) An injunction against further disposition by the debtor or transferee, or both, of the asset transferred or of other property; (b) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or (c) Any other relief the circumstances may require." N.J.S.A. § 25:2-29. Thus, this Court may impose equitable remedies such as constructive trust in connection with fraudulent transfer claims. See In re Halpert & Co., Inc., 254 B.R. 104, 120 (Bkrtcy.D.N.J. Feb. 25, 1999).

Pursuant to the express terms of the UFTA, CIF is within its rights to seek to have the entire transaction voided as fraudulent as well as imposition of a constructive trust. However, CIF has opted not to take such a heavy handed approach because of the involvement of

[4] The UFTA identifies a "Creditor" as a person who has a claim. It further defines a "Claim" as a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. N.J.S.A. § 25:2-21,22.

Brickhouse Partners, LLC, which is understood to be an independent investor that originally owned a partial stake in the Property[5].

A constructive trust should be imposed in any case where failure to do so would result in an unjust enrichment. Stewart v. Harris Structural Steel Co., Inc., 486 A.2d 1265 (N.J. Super. 1984). Against that backdrop, courts in New Jersey have traditionally applied a two-part test when determining whether a constructive trust is an appropriate equitable remedy, requiring proof of (1) a wrongful act, which (2) resulted in an unjust enrichment. Flanigan v. Munson 175 N.J. 597 (N.J. 2003)(citing D'Ippolito v. Castoro, 51 N.J. 584, 589 (1968)).

a. Wrongful Act

In order to meet the first prong of the two-prong test adopted by New Jersey courts, a movant is required to establish a "wrongful act." D'Ippolito, 51 N.J. at 589. Although CIF alleges a series of fraudulent transactions culminating in the transaction at issue herein, New Jersey courts have recognized that proof of fraud by the party upon whom the constructive trust is imposed is no longer necessary. Callahan v. Callahan, 142 N.J.Super. 325, 329-30 (App. Div. 1976) (repudiating former requirement of fraud). While fraud may still satisfy the first prong, it is clearly not the only way in which a party can establish a "wrongful act" for the purposes of imposition of a constructive trust. In the context of constructive trusts, "wrongful act" has been expansively defined to include, *inter alia,* fraud, mistake, undue influence, or breach of a confidential relationship which has resulted in a transfer of property. D'Ippolito, supra, 51 N.J. at 589.

[5] CIF reserves its rights to pursue any and all claims and remedies available to it and/or that may be revealed through ongoing discovery and investigation.

LRI through its principals, including Katz, borrowed substantial sums of money from CIF pursuant to a revolving credit arrangement whereby LRI was supposed to collateralize those loans. See Westrick Cert., Exhibit J, Second Amended Complaint, *inter alia*, ¶¶ 263-265. Indeed, LRI used CIF funds to invest in many real estate projects but failed almost entirely to take any steps to collateralize the debt owed to CIF. See Westrick Cert., Exhibit J, Second Amended Complaint, generally.

With full knowledge that the debt owed to CIF was not properly collateralized, Katz and others directly participated in actions that encumbered the properties that were intended to serve as collateral for CIF. See Westrick Cert., Exhibit J, Second Amended Complaint, ¶¶ 249-304. CIF alleges that it is the specific failure to properly collateralize the debt owed to it by LRI and the LRI affiliates that has lead directly to CIF's losses.

The intricate web of LLCs, company ownership and cross-investment is so complex that even its own participants, Katz included, have acknowledged the difficulty in sorting it out. Upon information and belief, in approximately 2003 CIF extended loans totaling $2 million directly to Wiltshire for the benefit of Katz and the other members See Westrick Cert., Exhibit **P**, Third Amended Complaint, ¶¶ 455-461. CIF alleges that these loans remain outstanding and by virtue of acquiring the other members' interests in Wiltshire, Katz (if not Wiltshire) is responsible for paying those loans.

The imminent transaction between RPOC/Brickhouse and Wiltshire/Katz cannot be considered in a vacuum. Rather, it is the culmination of countless schemes and transactions through which CIF was systematically misled and, ultimately, deprived of more than $18 million and in which Katz played a key role. This and the countless other transactions leading up to it fits squarely inside the purview of the UFTA and is precisely the scenario envisioned by the Courts in imposing constructive trusts as it is in furtherance of the defendants to place their assets beyond the reach of CIF as well as the Court while at the same time enjoying the benefits thereof.

b. Unjust enrichment

The touchstone for imposition of a constructive trust is unjust enrichment. First Interregional Advisors Corp. v. Golding, 218 B.R. 722, 733 (Bankr.D.N.J. 1997). Unjust enrichment occurs, of kind sufficient to support a constructive trust under New Jersey law, when an individual retains money or benefits which, in justice and equity, belong to another. In re First Interregional Advisors Corp., 218 B.R. 722 (Bkrtcy D.N.J. 1997). The Third Circuit has explained that the purpose of the equitable remedy of a constructive trust is "to restore the plaintiff property of which he has been unjustly deprived and to take from the defendant property the retention of which by him would result in a corresponding unjust enrichment of the defendant." Skretvedt v. E.I. Dupont de Nemours, 372 F.3d 193, 213 (3d Cir. 2004).

The complicated series of transactions detailed in the Second Amended Complaint were designed to and did, in fact, deplete the assets of LRI and, ultimately, CIF. Numerous defendants have professed to be insolvent and unable to satisfy any of the debts owed to CIF. This course of events gives rise to a concern that Katz may follow suit. However, a recently conducted title search of the Property reveals a mortgage in favor of Wiltshire and Katz in the amount of $8,500,000. See Westrick Cert. Exhibit **M**. Furthermore, in opposition to CIF's motion for leave to amend, RPOC indicates that RPOC and its part owner, Brickhouse, filed an action in equity against Katz and Wiltshire in 2012, which was settled in or around October of

2013. The settlement called for the sum of $9 million to be paid to Katz and Wiltshire in exchange for their interest in the property. The brief further provides that Katz and Wiltshire were paid $500,000 up front and were then granted a mortgage on the Property for the remaining $8.5 million, which is consistent with the results of the title search on the Property. Significantly, RPOC's brief further reveals that RPOC/Brickhouse intend to pay the remaining $8.5 million to Katz/Wiltshire "in early fall" of this year.

As a result of the fraudulent schemes and transactions of the defendants, the Property is the only known asset owned directly or indirectly by any LRI affiliates, which was acquired with CIF funds. Due to the actions and inactions of the defendants, CIF has been deprived of its rightful interest in the Property, including but certainly not limited to an ability to negotiate any transactions for the sale or development of it. To permit Katz and Wiltshire to abscond with the proceeds of the sale of the Property without the imposition of a constructive trust would add insult to injury by further depriving CIF any potential gains from the sale. Such a result would lead to Katz and/or Wiltshire being unjustly enriched, once again, to the detriment of CIF. To protect against such a scenario it is critical that the status quo be preserved while CIF's claims are litigated.

CONCLUSION

For reasons set forth herein, CIF respectfully requests that the Court impose a constructive trust on the funds Katz and Wiltshire are expected to receive in the sale of the Property.

Respectfully submitted,
TRESSLER LLP

By: ______________________________
CHRISTOPHER H. WESTRICK, ESQ.

Dated: October 8, 2014

NWK#57582